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IN THE

Supreme Court of the United States

October Term, 1957.

No. 178.

JOHN RUSSELL CROOKER, JR.,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

Brief on Behalf of American Civil Liberties Union of Southern California, Amicus Curiae.

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Interest of Party Submitting Brief.

This brief is submitted with the written consent of the parties. Said consent accompanies this brief.

One of the fundamental rights guaranteed by the Constitution is the right to fair and impartial administration of criminal justice. The American Civil Liberties Union is devoted to the protection of all personal rights guaranteed by the Constitution, and is concerned lest the decision in the case at bar dilute the right to effective legal counsel guaranteed by the Fourteenth Amendment as part of due process.

The Constitutional Principles to Be Argued.

1. Due process of law is denied by the admission into evidence of a "confession" made after a prisoner has been in custody for fourteen hours and has been refused assistance of counsel.

2. The Petitioner was denied due process of law by the refusal of the investigating officers to allow him to consult with an attorney within a reasonable time after his request for legal assistance.

ARGUMENT.

This Court is faced once again with the necessity of overturning a State court criminal conviction because of improper methods used by the State authorities to obtain that conviction. Petitioner contends that his constitutional right to assistance of counsel, encompassed in the concept of due process, was violated by the conduct of the prosecuting authorities herein. Moreover, this case raises the question whether an allegedly "voluntary confession," obtained after a prolonged period of detention and after refusal to furnish counsel upon request, can be admitted into evidence without violating fundamental rights of the defendant.

I.

Due Process of Law Is Denied by the Admission Into Evidence of a "Confession" Made After a Prisoner Has Been in Custody for Fourteen Hours and Has Been Refused Assistance of Counsel.

The jury instructions given in this case clearly raise certain constitutional issues with respect to the admissibility of confessions. The Transcript of Record shows that the trial judge apparently gave two instructions pertinent to defendant's right to assistance of counsel, and then reread those instructions, or portions thereof, to the jury [Tr. 709-710].

Instruction No. 21, by its terms, states that denial of counsel is one of the "circumstances" in determining whether the written confession was voluntary or involuntary.

The last portion of Instruction No. 20, which was reread to the jurors [Tr. 709], states:

> "If a confession is made when the accused is under arrest and is being detained, or when he is not represented by counsel, or when he has not been told that any statement he might make will or may be used against him, such circumstances in and of themselves do not make the confession involuntary, but all the facts connected with the making of a confession, if one was made, including any such as I have mentioned, ought to be considered by you in determining whether or not the confession was voluntary."

These instructions do not adequately state the law as it is and should be, and constitute reversible error. The issue is not, "Was the confession voluntary?" Rather, this Court should rule that *any confession obtained from a prisoner* AFTER *he has requested assistance of counsel* (and before obtaining counsel), *is inadmissible.*

No other rule will adequately implement and protect the due process guarantee of assistance of counsel. The sole question for the jury should have been: "Did the defendant request the assistance of counsel?" If the trier of fact believes that such a request was made, the allegedly "voluntary" nature of the "confession" is irrelevant. This Court can properly hold that any "confession" made during a period in which counsel has been refused the prisoner is inadmissible, *because no such confession can truly be "voluntary."*

Can one ever say that the despairing statement of an accused man, ignorant and fearful, without the guidance and reassurance of a friendly advisor, is "voluntary"? Isn't confinement, *combined with prolonged refusal to grant the prisoner the right to consult his lawyer,* inevitably coercive?

Amicus Curiae realizes that a confession obtained during improper and illegal detention, while inadmissible in federal prosecutions under the McNabb Rule, may be admitted into evidence, if found to be "voluntary," without violating due process. It is strongly urged, however, that our system of jurisprudence cannot stomach *both* prolonged detention *and* denial of counsel as concomitants of a "voluntary" confession.

This case should evoke more than the usual forthright, but cliché, declaration that a criminal defendant is entitled to effective counsel. More important in fact, it must be made clear that this Court will overturn any conviction based on an allegedly "voluntary" confession obtained after counsel is improperly denied. Only in this way can over-zealous prosecutors be compelled to give heed to prisoners' requests for counsel. Only in this way can the admittedly fundamental right to counsel be given meaning.

II.

The Petitioner Was Denied Due Process of Law by the Refusal of Investigating Officers to Allow Him to Consult With an Attorney Within a Reasonable Time After His Request for Legal Assistance.

In recent years this Court has decided many cases in which the petitioners have claimed that denial of their right to counsel has, in fact and in law, deprived them of procedural due process. From these cases, certain ground rules have developed regarding the right of an accused to counsel in criminal proceedings. Thus, the Sixth Amendment has been interpreted to require that the defendant in all criminal cases in the Federal Courts be entitled to counsel either of his own choosing, or provided for him if he is unable to procure his own. (*Johnson v. Zerbst*, 304 U. S. 458 [1938]; *Glasser v. United States*, 315 U. S. 60 [1942].) Procedural due process is not denied when the People fail to provide defendants with the assistance of counsel in *non-capital* offenses, unless special circumstances render the matter unfair. (*Betts v. Brady*, 316 U. S. 455 [1942].) This Court has repeatedly held, however, that when a man's life is at stake under charge of a capital offense in a State court, procedural due process requires that the accused have the right to the assistance of counsel, whether or not other special circumstances are present. (*Tompkins v. Missouri*, 323 U. S. 485 [1945]; *Williams v. Kaiser*, 323 U. S. 471 [1945].)

Here, Petitioner was charged and convicted of murder in the first degree, a capital offense in California. Under such circumstances, it is clear under the decisions of this Court that he was entitled to the assistance of counsel, either appointed or of his own choosing, regardless of the

circumstances. This right must encompass the assistance of counsel from the time an accused is taken into custody.

Judge Magruder, speaking for the First Circuit, has stated in *Melanson v. O'Brien,* 191 F. 2d 963 at 968 (1st Cir., 1951):

> "The right to employ and be represented by counsel involves as a corollary the obligation of the State not to deprive the accused of the effective exercise of such right, by pressing the criminal action either without affording him a reasonable opportunity to secure such counsel, or without affording counsel a reasonable time in which to consult with his client. . . ."

Here, from the time of Petitioner's arrest, according to his testimony, he made requests of the officers of the Los Angeles Police Department for permission to consult with an attorney and that permission was denied him. Further, the record indicates that Petitioner was told that he could not contact an attorney until after the investigation had been completed. We cannot now determine whether, if Petitioner's request for counsel had been granted, Petitioner would later have confessed and whether the State would have secured such evidence otherwise to convict him. This Court has held that:

> "The right to have the assistance of counsel is too fundamental and absolute to allow Courts to indulge in nice calculations as to the amount of prejudice arising from its denial." (*Glasser v. United States, supra,* at 76.)

The right to assistance of counsel has only recently been further clarified in the case of *Moore v. Michigan,* No. 42, decided by this Court on December 9, 1957 (355 U. S. ....., 26 N. W. 4023). In that case, a conviction following a

plea of guilty without assistance of counsel, was reversed. The Court stated *inter alia:*

> "The right to counsel is not a right confined to representation during the trial on the merits. *Reece v. Georgia,* 350 U. S. 85. The circumstances compel the conclusion that the petitioner's rights could not have been fairly protected without the assistance of counsel to help him with his defense."

The record in this case indicates that Petitioner had a specific attorney in mind, a Mr. Simpson of Long Beach. No matter the circumstances, no matter the offense and no matter the Court in which the offense is being tried, it is clear beyond doubt that regardless of whether an accused would be entitled to the appointment of counsel, his right to counsel of his own choosing is unqualified. (*Chandler v. Fretag,* 348 U. S. 3 [1954].) The doctrine enunciated in *Betts v. Brady, supra,* has no application when an accused seeks to obtain his own counsel. As was stated by this Court more than twenty-five years ago in the famous *Scottsboro* case:

> "What, then, does a hearing include? Historically and in practice, in our own country at least, *it has always included the right to the aid of counsel when desired and provided by the party asserting the right.* . . ." (*Powell v. Alabama,* 287 U. S. 45, 68 [1932]; emphasis added.)

This Court, speaking through Chief Justice Warren, has further held that a necessary corollary to the right to counsel is that a defendant must be given a reasonable opportunity to employ and consult with counsel, otherwise the right to be heard by counsel would be of little worth (*Chandler v. Fretag, supra*). Thus, where an accused asked the District Attorney for a continuance to obtain

counsel and the District Attorney refused and did not inform the Court of the accused's request, the Court held that the accused had been denied due process by being deprived of the aid and advice of counsel of his own choosing. (*Melanson v. O'Brien, supra.*) Knowledge of the judge, or knowledge of the attending Marshal as to the accused's desire for counsel have been sufficient to put the Court on notice so that any denial of the accused's request for counsel of his choice was held a denial of due process. (See: *Mills v. Ragen,* 77 Fed. Supp. 15 [N. D., Ill., 1948]; *Walleck v. Hudspeth,* 128 F. 2d 343 [10th Cir., 1942].)

Those decisions of this Court which have held that there had been no denial of due process by reason of lack of counsel in a capital case, all differ from the instant matter. Thus, in *Carter v. Illinois,* 329 U. S. 173 (1946), the Petitioner had pleaded guilty after being advised of his right to counsel by the trial court and had not requested counsel. In *Stroble v. California,* 343 U. S. 181, 197 (1952), where an attorney had come to the office of the District Attorney at the request of the accused's relatives and was turned away, this Court took pains to express the point: "*At no point* did Petitioner himself ask for counsel." Similarly, see *Gallegos v. Nebraska,* 342 U. S. 55 (1951).

The truly fundamental principle, long recognized but subverted by the conviction herein, is that advice of counsel is essential to insure an accused fair administration of criminal justice. This attitude has been expressed eloquently before by this Court.

> ". . . Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . he requires the guiding hand of counsel at every

> step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence . . . if in any case, civil or criminal, a State or Federal Court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing and, therefore, of due process in the constitutional sense." (*Powell v. Alabama, supra,* at 69.)

Laymen cannot be expected to understand the legal requirements of proper indictments, the various defenses available, or the technicalities of the law of evidence. Thus, in *Carter v. Illinois, supra,* the accused was faced with an indictment so ambiguous that he could have been convicted of claims ranging from assault with a deadly weapon to murder in the first degree. Only competent and effective counsel could have aided the accused in untangling the web of criminal justice. In *Gibbs v. Burke,* 337 U. S. 773 (1949), we find much relevant evidence on behalf of the defendant excluded, and considerable hearsay introduced against him without objection. This might have been prevented by competent counsel. And in *Chandler v. Fretag, supra,* we see the spectacle of an accused indicted for larceny and for the first time being informed at trial without counsel that he was being tried as a habitual criminal. Because he was unable to secure the assistance of counsel as he desired, he was tried, convicted and *punished* as a habitual criminal.

Who is to say now whether the Petitioner herein, with the effective assistance of counsel at the time of interrogation and detention, could not have shown a legal defense to the crime with which he was charged. But for the confession made after Petitioner was denied the assistance of

counsel and after Petitioner had been led to believe no help would be forthcoming until the police were finished with him, the State might never have been able to convict Petitioner.

Fundamental fairness requires that when an accused wants a lawyer, that it be required that the State afford him an opportunity to obtain one. Only by such a rule can we avoid the type of inquisition of which Americans justly complain, when citizens in certain European countries are pounced upon at will by State Police, are held in jail incommunicado, and are later convicted of crimes on confessions obtained during such incarceration. We believe the Constitution forbids such procedure as being in violation of due process, and ask the Court to so hold.

Conclusion.

The right of a criminal defendant to effective aid of counsel is undisputed. The case can either be a landmark by which that fundamental rule is implemented and clarified, or can become another of the too frequent cases in which a prisoner's rights are in fact (but not in law) denied, and respect for due process eroded.

It is submitted that this Court should make a forthright declaration that the right to counsel should be accepted in its literal terms, and that a confession obtained after a denial of counsel is inadmissible.

Respectfully submitted,

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